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Blue Man Vegas, LCC and International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and its Territories and Canada, Local 720, AFL-CIO. Case 28-CA-20868

September 14, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS KIRSANOW
AND WALSH

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on June 19, 2006, the General Counsel issued the complaint on July 14, 2006, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 28-RC-6440. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.¹

On July 31, 2006, the General Counsel filed a Motion for Summary Judgment. On August 2, 2006, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response, and the Union filed a joinder in the General Counsel's Motion.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the certification on the ground that the Board erred in excluding the Respondent's musical instrument technicians from the bargaining unit. Thus,

¹ The Respondent's answer denies knowledge or information sufficient to form a belief concerning the filing and service of the charge. The Respondent's answer also denies the complaint allegation that the Union was certified as the exclusive collective-bargaining representative of the unit on June 5, 2006. Copies of the charge, the certificate of service of the charge, and the Certification of Representative are included in the documents supporting the General Counsel's motion, showing the dates as alleged, and the Respondent does not refute the authenticity of these documents.

the Respondent contends that the certified unit is inappropriate.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the General Counsel's Motion for Summary Judgment.²

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Delaware corporation with an office and place of business in Las Vegas, Nevada (the Respondent's facility), has been engaged in the business of providing live entertainment.

During the 12-month period ending June 19, 2006, the Respondent, in conducting its business operations described above, derived gross revenues in excess of \$500,000 and purchased and received at the Respondent's facility goods valued in excess of \$5000 directly from points outside the State of Nevada.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and its Territories and Canada, Local 720, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.³

² In the underlying representation proceeding, Chairman Battista dissented from the Board's denial of the Respondent's request for review of the Regional Director's exclusion of the musical instrument technicians from the bargaining unit. Contrary to his colleagues, he would have granted review in order to give further consideration to the issue of whether the appropriate unit must include the musical instrument technicians. While he remains of the view that review was warranted, he agrees that the Respondent has not presented any new matters that are properly litigable in this unfair labor practice case. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). In light of this, and for institutional reasons, Chairman Battista agrees with the decision to grant the General Counsel's Motion for Summary Judgment.

³ The Respondent's answer denies sufficient knowledge or information regarding the Union's status as a labor organization. The Respondent, however, stipulated in the underlying representation proceeding that the Union is a labor organization within the meaning of the Act. Accordingly, we find that the Respondent's answer does not raise any issue warranting a hearing with respect to this allegation. See *All*

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held May 25, 2006, the Union was certified on June 5, 2006, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time stagehands and wardrobe employees; excluding all other employees, office-clerical employees, guards, and supervisors as defined in the Act.⁴

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

On or about June 5 and 14, 2006, the Union, by letters, requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the employees in the certified unit.

Since on or about June 5, 2006, the Respondent has failed and refused to recognize and bargain with the Union. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing since June 5, 2006, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*,

149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Blue Man Vegas, LLC, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and its Territories and Canada, Local 720, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time stagehands and wardrobe employees; excluding all other employees, office-clerical employees, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 5, 2006.

American Services & Supplies, 340 NLRB 239 fn. 2 (2003); *North American Enclosures, Inc.*, 344 NLRB No. 156 fn. 3 (2005).

⁴ Both the certification and the complaint expressly provide that Heads of Departments are neither included nor excluded from the unit.

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 14, 2006

Robert J. Battista , Chairman

Peter N. Kirsanow, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
 APPENDIX
 NOTICE TO EMPLOYEES
 POSTED BY ORDER OF THE
 National Labor Relations Board
 An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and its Territories and Canada, Local 720, AFL-CIO, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time stagehands and wardrobe employees; excluding all other employees, office-clerical employees, guards, and supervisors as defined in the Act.

BLUE MAN VEGAS, LLC